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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 444

BENJAMIN BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 258-270) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1950. (R. 270.) The petition for a writ of certiorari was filed on December 8, 1950. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether proof of increases in net worth was legally sufficient, under the circumstances of this case, to sustain a conviction for wilfully attempted tax evasion.

2. Whether the trial court erred in restricting petitioner's cross examination.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145)

STATEMENT

Petitioner was indicted in three counts under Section 145(b) of the Internal Revenue Code for attempting to defeat and evade a large part of the

income and victory tax owing by him to the United States for the years 1943, 1944 and 1945 by filing false and fraudulent returns for each year, in which he knowingly understated his net income and the amount of the tax. It was charged that for the year 1943 he reported a net income of $11,135.39 and a tax of $2,912.28 although his income was $69,836.83 and his tax $41,125.84; for the year 1944 he reported a net income of $13,887.71 and a tax of $3,378.96 although his income was $41,115.81 and his tax $18,771.73; and for the year 1945 he reported a net income of $18,667.14 and a tax of $5,593.57 although his income was $25,203.85 and his tax $8,940.28. (R. 258.)

He was tried and convicted by a jury in the District Court and sentenced to a fine of $10,000 and imprisonment for six months on the first count; $5,000 and six months imprisonment on the second count; and $2,500 and six months imprisonment on the third count, the sentences of imprisonment to run concurrently and the fines to be cumulative. (R. 258.)

The petitioner offered no witnesses on his behalf, although he employed accountants who kept the books of the corporation and an auditor who conferred with the revenue agents. (R. 259.)

Petitioner was an auctioneer. He had carried on that business since 1933 at 722 13th Street, N. W., Washington, D. C., through a corporation called Washington Art Galleries and Auction Rooms, of

which he was the virtual owner. He was also the sole owner in his personal capacity of an auction business for used furniture, which was carried on in Alexandria, Virginia, under the name of Mt. Vernon Galleries. The business at this location was closed and removed to the 13th Street store of the corporation in Washington in November, 1942. During the years 1943 to 1945 under investigation, petitioner continued to use the name of the Mt. Vernon Galleries to denominate his personal business in his personal income tax return and reported the net income therefrom in addition to the salary and dividends which he drew from the corporation. (R. 259.)

Petitioner kept no books of account or records of the income of his individual business except his bank deposit book, in which some descriptive entries were made; his personal check book; and certain cancelled checks. (R. 259-260.) The corporation kept books which included a cash book, a journal and a ledger; and the ledger contained separate accounts which purported to show transactions between the corporation and petitioner, and between the corporation and the Mt. Vernon Galleries respectively. There were, however, no records, except in a minority of instances, to support the entries on the books of the corporation. There were only fifty or sixty invoices during the period 1943 to 1945 covering the consignment of goods for sale and the commissions paid thereon, which varied in amount from time to time;

and except for certain cancelled checks there were no other documents or cash register tapes to support the entries in the books. Moreover, the entries in the books, except those in the cash book, were not made daily; but the entries in the journal and ledger were made some time during the year from the cash book, check books and other data. (R. 260.) The entries in the cash book showed only ~~disbursements~~ receipts and were quite informal and devoid of explanation. Typical of the entries is the following (R. 260):

January 2, 1943	Johnson	$ 50.00
	Elizata	125.00
	Kent	652.30
	Guest	12.50
		$839.80

An investigation of the income tax liabilities of the petitioner during the years in question was instituted in March, 1946, by Charles H. Knight, a special internal revenue agent, who interviewed the petitioner and learned from him some things in respect to the nature of his business and his investments. His business records were made available to the agent. Knight had been connected with the Bureau of Internal Revenue in the statistical section of the Corporation Tax Division since 1938, had secured a degree in accountancy and had been working on books and accounts in income tax matters since 1940. He concluded from

his investigation that the corporate books and other data submitted to him by petitioner did not reveal the taxable income of petitioner because the corporate books were kept on a fiscal year basis whereas petitioner's income was reported on a calendar year basis, and especially because of the deficiencies of the corporate records in support of the entries on the corporate books above described. (R. 260-261.)

These inadequacies led the agent to prepare a net worth statement to ascertain petitioner's true income for the years in question. The petitioner not only conducted an auction business but also dealt in securities and in real estate. Accordingly, the agent made an extended examination of real estate records, bank records, stockbrokers' records, Treasury Department records, insurance company records, mortgage and lending institution records, in order to ascertain the petitioner's assets and liabilities. From this data he prepared a net worth statement showing the total assets of the petitioner, including cash in bank, United States bonds, stock, real estate, loans receivable, life insurance and other investments amounting to a total of $129,-991.17, and liabilities consisting of mortgages on real estate and reserve for depreciation in the aggregate sum of $47,722.20, or a net worth on December 31, 1942, of $82,218.97. (R. 261.) The item of cash in banks included monies in the name of petitioner's wife and children, since petitioner

had stated that they had no independent source of income. (R. 261.) The agent did not find and there was no intimation that petitioner owned any other assets. (R. 48.)

A copy of the net worth statement was made available to petitioner's accountant. (R. 24.) Petitioner had access to his accountant's net worth account papers and work sheets. (R. 49, 147.) Petitioner made no claim at the time that he possessed other assets than those shown on the statement and he offered no evidence at the trial to contradict this statement of his net worth at the beginning of the period under examination. (R. 261.)

By resort to similar records, the agent found petitioner's net worth at the end of 1943, 1944 and 1945 to be $141,208.48, $175,950.06 and $201,482.78, respectively; and by subtracting the net worth of the preceding year, the increases in net worth during the taxable years were found to be $58,989.51, $34,741.58 and $25,532.72, respectively. (R. 261.)

In order to find the taxable income for these years, the disbursements of petitioner for living expenses, taxes, insurance premiums and miscellaneous expenses were added and the allowable deductions from income and the non-taxable long term gains were subtracted so that the taxable net income for the years in question was found to be $69,836.83, $40,615.81 and $24,703.85, respectively. (R. 261.)

The agent testified that petitioner admitted that

he had not received any gifts or inheritances but that everything he touched "seemed to turn to gold" during the years in question (R. 48); that his wife was a housewife and the monies used by her were furnished to her by him (R. 28); and that on inquiry about cash on hand in 1942, 1943, 1944 and 1945 petitioner stated orally he would get small amounts which were not sufficient for making deposits (R. 101-103). Petitioner contended during an interview with the examining agent on October 11, 1946, some six months after the investigation started, that he had other available assets in the form of alleged gifts from his mother to his wife and his children. (R. 48-51.) He told the agent that on each of his wedding anniversaries his mother would give his wife a four thousand dollar anniversary present and on each of the three children's birthdays she would give a like amount. (R. 49.) This money was said to have been kept in a small safe on the top floor of petitioner's business premises. (R. 78.) Petitioner told the agents he did not know where his mother kept her money. (R. 78.) During each of the years covered by the indictment, petitioner claimed his children and his mother as dependents. (R. 7-8.) Petitioner's 1943 return gave as his reason for claiming his mother as a dependent that she was "incapable of self-support". (R. 49.)

The statement prepared by the agent showed that the greatest increase in net worth during the

period under examination was in real estate. At the end of 1942 petitioner owned real estate in the sum of $77,546.57. This item was increased to $138,761.20 at the end of 1943, $147,887.24 at the end of 1944, and $219,220.91 at the end of 1945. The testimony as to the source of the funds with which petitioner increased his real estate holdings may be summarized as follows. In 1943 petitioner purchased real estate in Atlantic City for the sum of $45,038.76 and paid for it with two checks on his personal bank account in the aggregate sum of $5,188.76 and one check for $39,850 on the bank account of his corporation which sum petitioner had deposited to the corporation's credit. When asked as to the source of this money petitioner told the agent that he had gotten it in the form of a loan from his mother who paid it to him in cash. No check or promissory note or other record evidence of the loan was shown to the agent or produced at the trial. Petitioner told the agents that no interest on the loan had been paid and he continued to list his mother as a dependent in his tax returns for 1944 and 1945. (R. 262.)

In 1943, the property No. 9707 Georgetown Road in Washington was purchased in the name of petitioner's wife for $16,175.87 with funds taken from her account, and the title was taken in her name. The money, however, was deposited in her account by petitioner. She was listed in his tax returns as a dependent and filed no tax returns

herself. In 1944, the adjoining property was acquired under similar circumstances for $9,126.04 and placed in the name of petitioner's wife. (R. 262-263.)

In 1945, petitioner sold the Atlantic City property for $75,000 and bought a building at 1808 Adams Mill Road in Washington for $100,622.43, paying the difference from his personal and corporate bank accounts. In 1945 he purchased a one-third interest in the property at No. 7101 Georgetown Road for the sum of $15,750. The net worth statements show no reduction of the other assets or increase of liabilities sufficient to cover the increase in petitioner's real estate. (R. 263.)

ARGUMENT

1. Petitioner's corrected net income was proved by showing increases in his net worth during each of the indictment years, along with evidence tending to show (1) a source of the unreported net income and (2) the improbability that the increases in net worth reflected anything other than current income. Indirect proof of corrected net income is fully warranted in criminal tax prosecutions where, as here, the records maintained by the taxpayer do not clearly reflect income. Internal Revenue Code, Sec. 41 (26 U.S.C. 1946 ed., Sec. 41). This Court (*United States* v. *Johnson,* 319 U. S. 503, 517, rehearing denied, 320 U. S. 808) and the various Courts of Appeals have sanctioned

proof of net income by bank deposits or expenditures or net worth increases or by a combination of these three types of circumstantial evidence. *Gleckman* v. *United States,* 80 F. 2d 394 (C.A. 8th), certiorari denied, 297 U. S. 709; *United States* v. *Skidmore,* 123 F. 2d 604 (C.A. 7th), certiorari denied, 315 U. S. 800; *United States* v. *Chapman,* 168 F. 2d 997 (C.A. 7th), certiorari denied, 335 U. S. 853; *Barcott* v. *United States,* 169 F. 2d 929 (C.A. 9th); *United States* v. *Potson,* 171 F. 2d 495 (C.A. 7th); *Stinnett* v. *United States,* 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U. S. 957; *Schuermann* v. *United States,* 174 F. 2d 397 (C.A. 8th), certiorari denied, 338 U. S. 831, rehearing denied, 338 U. S. 881; *Kirsch* v. *United States,* 174 F. 2d 595 (C.A. 8th); *Bryan* v. *United States,* 175 F. 2d 223 (C.A. 5th), affirmed, 338 U. S. 552; *United States* v. *Fenwick,* 177 F. 2d 488 (C.A. 7th); *Lurding* v. *United States,* 179 F. 2d 419 (C.A. 6th); *Jelaza* v. *United States,* 179 F. 2d 202 (C.A. 4th); *Buttermore* v. *United States,* 180 F. 2d 853 (C.A. 6th); *United States* v. *Vassallo,* 181 F. 2d 1006 (C.A. 3d); *United States* v. *Venuto,* 182 F. 2d 519 (C.A. 3d).

The cases which rely on the net worth increase method are all in agreement as to the requisites for successful prosecution. There must be, of course, proof of actual increases in net worth. Furthermore, in order that the increases may be considered as *current* income, the Government must show a

source of income to account for them and it must offer evidence tending to establish the soundness of its net worth starting point.

All of the aforementioned conditions for successful prosecution have been met in this case. Petitioner's attack upon the correctness of the net worth ingredients relates at best only to the weight to be given the Government's net worth computation, not its admissibility. Even if the computation were not wholly correct in all of its details, the judgment of conviction must be sustained if the jury considered it to be substantially correct. *United States* v. *Ragen,* 314 U. S. 513, rehearing denied, 315 U. S. 826; *United States* v. *Johnson,* 319 U. S. 503, 517-518, rehearing denied, 320 U. S. 808.

There is ample evidence of a source of income to account for the increases in net worth. It was shown that petitioner was an auctioneer doing business in corporate and individual capacities. His personal returns for the years in question showed net income ranging from approximately $11,000 to $18,000, respectively. The Government was not required to prove specific items of unreported income in order to establish a source; it was sufficient to show a possible source of the funds responsible for the net worth increases. *United States* v. *Chapman, supra.*

Petitioner contends (1) that the Government here relies upon a naked net worth analysis, with-

out any substantial evidence relating to his net worth at the beginning of the indictment period and (2) that the opinion below is therefore in conflict with the *Bryan* and *Fenwick* decisions. Both contentions are without merit. As to the net worth analysis, the evidence reveals a comprehensive investigation of petitioner's assets and liabilities, showing increases in net worth of approximately $58,000, $34,000 and $25,000, respectively, in the years involved. In considering the substantiality of the starting point net worth, it must be remembered that petitioner did not offer any testimony in this case. The Government, however, proved that a copy of its starting point net worth statement was made available to petitioner's accountant, but that petitioner made no claim that he possessed assets other than those shown on the statement. The Government's agent testified that petitioner had made the following admissions: that he had not received any gifts or inheritances, but that everything he touched "seemed to turn to gold" during the years in question (R. 48); that monies used by his wife were furnished to her by him (R. 28); that with reference to cash on hand in 1942, 1943, 1944 and 1945, he would get small amounts which were not sufficient for making deposits (R. 101-103). Petitioner contended, during an interview with the examining agent approximately six months after the investigation had begun, that he had other available assets in the

form of alleged gifts from his mother to his wife and children (R. 48-51) and that the money was kept in a small safe on the top floor of his business premises (R. 78). However, it was proved that during each of the indictment years petitioner claimed his children and his mother as dependents. (R. 7-8.) In his 1943 return petitioner stated that his mother was "incapable of self-support". (R. 49.) It is submitted that all of this testimony, particularly in the absence of any defense explanation, established a net worth starting point sufficiently substantial to permit the case to go to the jury. *Abrams* v. *United States,* 250 U. S. 616, 619; *Curley* v. *United States,* 160 F. 2d 229 (C. A. D. C.).

As pointed out by the court below, the *Bryan* and *Fenwick* cases are distinguishable on their facts. For example, in the *Bryan* case, 175 F. 2d at 226, the court found that the Government's witness had "frankly admitted that he did not know whether his computation contained all the assets of the Defendant or not". The *Fenwick* opinion, p. 491, calls attention to certain specific instances in which "the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning * * * was in fact all of the property then owned by him".

2. The trial court's restriction of cross examination by petitioner's counsel does not warrant

exercise of the supervisory power of this Court. Petitioner did not present any direct testimony on his own behalf. It is apparent, as the court of appeals has stated, that petitioner "endeavored to prove his case through cross examination of the witnesses and was not allowed, in a number of instances, to go outside the scope of the direct examination". (R. 268.) For the reasons given in the opinion below (R. 268-9) we think that such limitations on cross-examination as were imposed were entirely proper.

CONCLUSION

The decision of the court below is plainly correct and there are no conflicts of decision. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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